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IN THE

Supreme Court of the United States

October Term, 1932

No. 317

PUBLIC SERVICE COMMISSION OF WISCONSIN, THEODORE KRONSHAGE, JR., individually and as a Commissioner of said Public Service Commission of Wisconsin, A. R. McDONALD, individually and as a Commissioner of said Public Service Commission of Wisconsin, DAVID E. LILIENTHAL, individually and as a Commissioner of said Public Service Commission of Wisconsin, WILLIAM M. DINNEEN, individually and as Secretary of said Public Service Commission of Wisconsin, and JOHN W. REYNOLDS, individually and as the Attorney General of Wisconsin,

Appellants,

vs.

WISCONSIN TELEPHONE COMPANY, a Wisconsin corporation,

Appellee.

BRIEF OF APPELLANTS

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IN THE

Supreme Court of the United States

October Term, 1932

No. 517

PUBLIC SERVICE COMMISSION OF WISCONSIN, THEODORE KRONSHAGE, JR., individually and as a Commissioner of said Public Service Commission of Wisconsin, A. R. McDONALD, individually and as a Commissioner of said Public Service Commission of Wisconsin, DAVID E. LILIENTHAL, individually and as a Commissioner of said Public Service Commission of Wisconsin, WILLIAM M. DINNEEN, individually and as Secretary of said Public Service Commission of Wisconsin, and JOHN W. REYNOLDS, individually and as the Attorney General of Wisconsin,

Appellants,

vs.

WISCONSIN TELEPHONE COMPANY, a Wisconsin corporation,

Appellee.

BRIEF OF APPELLANTS

NATURE OF CASE AND RESULT BELOW

On June 30, 1932, the Public Service Commission of Wisconsin issued an order reducing "exchange" rates of Wisconsin Telephone Company by 12½%. The order was a temporary order, pending completion of the Commission's investigation, and was to be effective *for one year* unless sooner modified or revoked. (R. 155)

On July 30, 1932, the District Judge issued a temporary restraining order. (R. 256) On September 21, 1932, a statutory court in the Western District of Wisconsin, on application for interlocutory injunction, issued the injunction. (R. 628) On October 18, 1932, decree for interlocutory injuction was filed. (R. 629-632)

On October 21, 1932, appeal was allowed from the decree for interlocutory injunction. (R. 636) The appeal is brought directly to this Court, pursuant to Section 266 of the Judicial Code.

THERE WAS NO OPINION BELOW—*no findings of fact or conclusions of law filed.*

ASSIGNMENT OF ERRORS

We assigned and shall urge the following errors: (R. 635)*

1. The court erred in not finding any facts or stating any legal conclusions which show confiscation.

2. The court erred by abusing its discretion and arbitrarily granting the interlocutory injunction.

3. The court erred in not reserving to the defendant Public Service Commission of Wisconsin any power to make the rate reduction, herein enjoined, by way of a permanent order after the completion of its investigation and after the temporary order, herein enjoined, shall have expired by its own terms on July 31, 1933.

4. The court erred in holding that the rates prescribed by the order of defendant Public Service Commis-

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*References are to the printed transcript. References in our Brief in Opposition to Motion to Affirm were to the original transcript.

sion, dated June 30, 1932, would result in confiscation of complainant's property.

5. The court erred in granting the interlocutory injunction enjoining defendants from attempting to compel complainant to observe or put in force the rates for telephone service prescribed by the order of the Public Service Commission, dated June 30, 1932, or to comply with said order, and also enjoining said defendants from taking any steps or proceedings to enforce said order.

STATEMENT OF JURISDICTION

Statement of Jurisdiction has been filed by appellants. Appellee does not dispute that the appeal comes within Section 266 of the Judicial Code.

ABUSE OF DISCRETION

There is one question before this Court on appeal from the decree for an interlocutory injunction. That question is: *Abuse of Discretion.*

> *Prendergast v. New York Telephone Company*, 262 U. S. 43, 51;
> *Alabama v. United States*, 279 U. S. 229, 231.

We have made the showing of "Abuse of Discretion" in our Statement of Jurisdiction, pursuant to Rule 12, effective September 1, 1932. We urge the court to consider our Statement of Jurisdiction as part of this Brief on Appeal. We also request that the court refer to our Brief in Opposition to Motion to Affirm.

We shall cover our Assignment of Errors in the present argument on Abuse of Discretion.

SUMMARY OF ARGUMENT

I.

The court abused its discretion when it violated Rule 70½ and allowed the interlocutory injunction without making even a prima facie determination of the facts and/or law which constitute confiscation.

II.

The court abused its discretion by arbitrarily granting the injunction without the "hearing and determination" required by section 266 of the Judicial Code.

III.

The court abused its discretion when it issued the interlocutory decree without reserving to the Public Service Commission any power to make the rate reduction, herein enjoined, by way of a permanent order after completion of its investigation and after the temporary order, herein enjoined, shall have expired by its own terms.

IV.

The court abused its discretion in holding that the rates prescribed by the Commission's order were confiscatory.

V.

The court abused its discretion in granting the interlocutory injunction.

ARGUMENT

I.

THE COURT ABUSED ITS DISCRETION WHEN IT VIOLATED RULE 70½ AND ALLOWED THE INTERLOCUTORY INJUNCTION WITHOUT MAKING EVEN A PRIMA FACIE DETERMINATION OF THE FACTS AND/OR LAW WHICH CONSTITUTE CONFISCATION.

The Supreme Court can promptly dispose of this case by reversing and remanding to the District Court for findings and conclusions pursuant to Equity Rule 70½.

The lower court granted the injunction *from the bench* without even a prima facie determination, *then or afterwards*, of the findings of fact or conclusions of law which establish confiscation.

The statutory court had no discretion not to make findings of fact and conclusions of law. Equity Rule 70½ is specific:

> "In deciding suits in equity, including those required to be heard before three judges, the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rules 75 and 76."

In *Indianapolis Water Company v. McCardle*, United States District Court, Southern District of Indiana, decided July 21, 1932, Equity No. 1403, the statutory court, *in denying the interlocutory injunction,* said (Evans, Circuit Judge): "In all matters of this kind, in view of Rule 70½, we have to make findings of fact upon the determinative issues."

In *Indiana General Service Company v. McCardle*, United States District Court, Southern District of Indiana, 1 F. Supp. 113, 114, the statutory court, *in granting the interlocutory injunction*, said: "Special findings of fact and conclusions of law were filed in compliance with Equity Rule 70½."

In *Graniteville Manufacturing Company v. Query*, 44 F. (2d) 64, 65, the statutory court, *in denying the interlocutory injunction*, made findings of fact pursuant to Rule 70½ *even though the parties had stipulated to the facts.*

> ". . . . *The matter comes up upon an application for an interlocutory injunction, made before three judges, under the provisions of section 266 of the Judicial Code, as amended.* . . . .
>
> "The parties have entered into a written stipulation as to the facts of the case, which has been filed as a part of the record in the cause. The new Equity Rule 70½, recently promulgated by the Supreme Court, requires the courts of first instance, in deciding suits in equity, to find the facts and state the conclusions of law thereon, separately. Where all of the facts have been stipulated by the parties and made a part of the record, it would seem unnecessary to recite the facts in any opinion or decree made by the court, or make any special finding thereon. However, *to avoid any uncertainty*, we find all the facts as set forth in the stipulation, but do not deem it necessary to restate them in detail in this opinion but will make only such brief statement as may be necessary for a proper understanding of the grounds of our decision."

Two of the leading and most recent text writers on Federal Practice emphasize that Rule 70½ *changes the pre-existing law and practice.*

> *Nichols, Cyclopedia of Federal Procedure*, Volume 8, Section 5547a, (July, 1930)

"No. 5547a—NEW 1930 RULE. A new Equity Rule numbered 70½, to become effective October 1, 1930, provides that 'in deciding suits in equity, including those required to be heard before three judges, the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record' and included in the record if an appeal is taken from the decree. THIS CHANGES THE PRE-EXISTING LAW AND PRACTICE." (Our caps)

Nichols, Cyc., Sec. 5552.

"5552. MATTERS WHICH SHOULD, OR MAY, BE OMITTED IN DECREE. These include the following:

* * * * * * * * *

"2. Findings of fact and conclusions of law, except where necessary to make the decree clear and specific, *and except where required by Equity Rule* 70½ . . . ."

Hughes, Federal Practice, Sec. 10962:

"10962. FINDINGS AND CONCLUSIONS

"A court of three judges is required to find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions must be entered of record, and, if an appeal is taken from the decree, must be included by the clerk in the record which is certified to the appellate court under Equity Rules 75 and 76."

Hughes, Fed. Prac., Sec. 11438

"11438 CONTENTS

"The decree should point out precisely:

"* * * * * * * *

"(f) *Find facts specially, and state separately conclusions of law thereon.*"

Footnote No. 3, *Hughes,* 11438

"*Prior to Rule* 70½.

"*Prior to the promulgation of equity rule* 70½, it was proper to include findings of fact only when necessary to make the decree more clear and specific. *U. S. v. Goldstein* (C.C.A. Mo. 1921) 271 F. 828. . . . ."

In our Brief in Opposition to Motion to Affirm, we have cited twenty-four cases wherein Federal courts have applied Equity Rule 70½. Some of those cases involved permanent injunctions. Several applied the rule to interlocutory injunctions. *We have not found a single authority which holds or even intimates that the rule does not apply to interlocutory injunctions.*

Indeed, the rule expressly includes appeals in cases "*required to be heard before three judges.*" The court of three judges is designed primarily for *interlocutory* injunctions. Those are the only injunctions *required* to be heard before three judges. A single judge may hear the case where only a permanent injunction is applied for. The records of the Supreme Court will show that an overwhelming number of the appeals from three-judge courts are on interlocutory, not permanent, injunctions.

It seems rather paradoxical for appellee to contend, as it does in its reply brief to our brief opposing motion to affirm, that, although 70½ expressly includes appeals from three-judge courts, and although the injunctions required to be heard by three-judge courts are interlocutory injunctions, nevertheless 70½ does not apply to interlocutory injunctions coming from three-judge courts.

We are not concerned with cases arising prior to the

effective date of the rule, e.g., *Mitchell v. Penny Stores*, 284 U. S. 576, relied upon by appellee in its brief on Motion to Affirm, a case where the interlocutory injunction was filed September 9, 1930, the rule not going into effect until October 1, 1930. (See Appellants' brief opposing motion to affirm, page 6.)

This Court, of course, is the sole judge of its own rule. The rule is plain enough to us. It applies to cases arising from three-judge courts and is intended to include appeals from temporary injunctions. We suggest, however, that even if the court should hold that the rule does not apply by its express intendment to *all* cases of temporary injunctions, nevertheless this Wisconsin Telephone case is one where the Supreme Court, *even in the absence of a rule,* should reverse and remand for findings.

The Wisconsin Telephone case deals with a rate reduction of $1,500,000 between August 1, 1932, and July 31, 1933. (R. 150.) The printed record is 640 pages long, packed almost solid with pleadings and affidavits. The case was not before the lower court on simply a bill plus cursory affidavits. The case was before the court on bill and on an answer of twenty-three printed pages, which answers specifically every allegation of the complaint. (R. 261-283) The affidavits, and exhibits attached, cover from page 289 to page 627 of the printed record, exclusive of the affidavits on application for restraining order.

To expect this Court to sift and winnow the 640 page record, without findings or conclusions to assist it, is an imposition on this Court.

The Supreme Court admonished the very District Court herein involved, namely, for the Western District of Wisconsin, that in cases of such a nature it would expect

findings of fact and conclusions of law. This Court said in the *Maxcy* case—*Railroad Commission of Wisconsin v. Maxcy*, 281 U. S. 82, 83, 84:

> "This court has repeatedly adverted to the importance in a suit of this character of a statement by the district court of the grounds of its decision . . . .
>
> ". . . . '*The importance is even greater where the decree enjoins the enforcement of a state law or the action of state officials thereunder. For then the respect due to the state demands that the need for nullifying the action of its legislature or of its executive officials be persuasively shown.*' . . . .
>
> "The decree is set aside, and the cause is remanded to the district court, specially constituted as provided by the statute, to state its findings of fact and conclusions of law and enter a decree thereon, ..."

The Maxcy case was decided March 12, 1930. *Rule* 70½ *was promulgated June* 2, 1930, *effective October* 1, 1930.

The Circuit Court of Appeals for the Third Circuit in *Board of Public Utility Commissioners v. Elizabethtown Water Company*, 43 F. (2d) 478, 481, said:

> "We have before us the new Equity Rule No. 70½ (28 U.S.C.A. No. 723), not yet effective, requiring the 'three judges' of a 'court of first instance' 'to find facts specially and state separately its conclusions of law thereon' in cases of this kind, and we have in mind the insistence of the Supreme Court, last made in *Railroad Commission of Wisconsin v. Maxcy*, 281 U. S. 82, 50 S. Ct. 228, 74 L. Ed. 717, that in cases of this character district courts shall state the grounds for their decisions . . . ."

The Circuit Court of Appeals for the Fourth Circuit said in *Meadows v. Cheshire*, 58 F. (2d) 628:

". . . . The district judge did not find the facts with regard to the claim of Meadows nor state his conclusions of law with regard thereto, *as required by equity rule 70½; and it is impossible for this court to review the order with any understanding of the grounds upon which the court acted.* The case will be remanded, therefore, in order that the judge may, in compliance with the rule, find the facts and set forth his conclusions of law."

In the only adjudication by the Supreme Court directly affecting 70½ that we can find, the court made its position clear when it said—*State Board of Commissioners v. Jackson*, 283 U. S. 527, 535:

"The district court failed to make findings of fact and law as now required by Equity Rule 70½, but contented itself with a partial summary of the facts and certain general conclusions of law. *Had the rule been in force at the time of the trial, we should feel constrained to remand the case with directions to make such findings . . . .*"

This is not a hollow matter of technical compliance with a rule. *The right to adequate review is denied.* This is a confiscation case and the lower court, in a fiat of fifteen words, announces confiscation. (R. 630) Yet all parties, and this court on review, are at a loss to conjecture as to what facts, if any, in the 640 page record, the lower court rests upon to substantiate this pronunciamento of confiscation—whether the court has any findings in mind on amount of return, rate of return, and the other elements which are ordinarily regarded as the essence of a confiscation make-up, or whether the court has gone off on a tangent as to some legal defect appearing to it in the Commission's order.

The district court has left nothing as a guide, except one printed line in this record of thousands of lines and that line is its bare statement that the rates "would result in the confiscation of the property of said complainant devoted to telephone service." (R. 630)

The clerk's journal shows simply the fact of the injunction issuing upon giving bond. (R. 628)

This injunction should not have been granted, without an indication of findings of fact and conclusions of law to back it up. The case should be reversed and remanded.

Virginian Railroad Company v. United States, 272 U. S. 658, 675:

> "Unless an opinion indicating the grounds of the decision is delivered, a defeated party may often be unable to determine whether the case presents a question worthy of consideration by the appellate court. This is particularly true, where the case is in equity and the decree is entered upon a hearing involving complicated facts."

C. C. C. & St. L. Railway Company v. United States, 275 U. S. 404, 414:

> ". . . . Where the trial court omits to state the grounds of its decision, the appellate court is denied an important aid in the consideration of the case . . . ."

B. & O. Railroad Company v. United States, 279 U. S. 781, 787;
Arkansas Railroad Commission v. United States, 274 U. S. 596, 603;
Panama v. Vargas, 281 U. S. 670, 671, 672.

We repeat below the list of Federal cases, not included above, which apply Rule 70½:

Posselius v. City of Detroit, 44 F. (2d) 395, 399;
Western Electric Company v. Kersten Radio Equipment, 44 F. (2d) 644, 647;
Briggs v. United States, 45 F. (2d) 479, 480;
Gates Rubber Company v. Goodrich Rubber Company, 45 F. (2d) 652, 657;
Metropolitan Device Corp. v. American Casting Corporation, 46 F. (2d) 509, 511;
Ullman v. Sobel, 47 F. (2d) 612, 615;
Lewys v. O'Neill, 49 F. (2d) 603, 618;
Interstate Commerce Commission v. Piedmont Railway Co., 51 F. (2d) 766, 777;
Hazeltine Corp. v. Radio Corporation of America, 52 F. (2d) 504, 512;
Hutchings v. Caledonian Insurance Company, 52 F. (2d) 744, 745;
American Can Company v. M. J. B. Company, 52 F. (2d) 904;
Parker v. St. Sure, 53 F. (2d) 706, 709;
Harris v. Morse, 54 F. (2d) 109, 116;
Kaufman v. Tames, 56 F. (2d) 193, 196;
General Electric Company v. United States Electric Company, 56 F. (2d) 630, 634;
Traitel Marble Co. v. Manhattan Company, 56 F. (2d) 1039, 1046;
Allied Stamping Company v. Standard Electric Corporation, 57 F. (2d) 296, 305;
Queen Insurance Company v. Citro, 58 F. (2d) 107, 110;
Automatic Company v. A. O. Smith Corp., 60 F. (2d) 740, 742;
Frankfurter and Landis, 45 Harvard Law Review, 271, 299-300, (December, 1931).

II.

THE COURT ABUSED ITS DISCRETION BY ARBITRARILY GRANTING THE INJUNCTION WITHOUT THE "HEARING AND DETERMINATION" REQUIRED BY SECTION 266 OF THE JUDICIAL CODE.

We have very little to add on this subject to point II in our Statement of Matters Showing Abuse of Discretion in the "Statement of Jurisdiction" (pp. 12-14), as supplemented by point II of our Brief in Opposition to Motion to Affirm (pp. 12-18).

We did not get a square deal in the United States District Court, to speak bluntly. We received from the court not even a superficial treatment of the evidence. The court record shows 640 pages of compact data and an order of the Public Service Commission upon which the Commission had worked eleven months (R. 42), an order based on almost 4,000 pages of testimony and approximately 250 exhibits before the Commission which are itemized but not included in the court record (R. 436-451), culminating in a decision of the Commission which covers 156 printed pages, with a synopsis and glossary. (R. 38-212)

This case was taken up, "heard," dealt with, "deliberated" and disposed of, by the court, in the space of three hours in one day. The injunction issued from the bench. No human trial court could do that with intelligence and equity. This trial court did not. The best evidence that the court could not pass a reasoning judgment, is its utter inability to make intelligent findings. It made none at all.

This is not merely a question of rights between litigants. This is a matter of respect between governments.

After a state commission (one of national reputation) has had a trained staff at work for a year, and that commission has issued a decision of 156 pages, which decision shows great care and thought—is a lower Federal court to be allowed to nullify their labors in a few hours, between trains?

Is this the "adequate and full deliberation" guaranteed by Section 266 of the Judicial Code?

The record in this case, comprising 156 pages of Commission analysis and over 400 pages of pleadings and affidavits, *speaks for itself* that the injunction was issued summarily, arbitrarily, and in defiance of Section 266 of the Judicial Code and of this Supreme Court when it says that 266 is intended to guarantee "adequate and full deliberation."

> *Stratton v. St. Louis Southwestern Railway Company,* 282 U. S. 10, 14;
> *Cumberland Telephone and Telegraph Company v. Louisiana Public Service Commission,* 260 U. S. 212, 216.

Furthermore, we have pointed out in III in our Statement of Jurisdiction (p. 14) and in our Brief in Opposition to Motion to Affirm (III, p. 19) that the Wisconsin Telephone case does not represent the case of an ordinary interlocutory injunction and that what the court granted was in effect a permanent injunction.

The order of the Commission, which was enjoined, goes out of existence July 31, 1933. It is a one year order.

The court was really issuing a permanent injunction, for the interlocutory injunction will be the final injunction *in fact.* By the time that we reach the theoretical stage of permanent injunction, the Commission's order will be a dead letter by its own terms.

This fact magnifies the abuse of discretion in granting the injunction precipitously.

For the reason that the court did not give the case the consideration which even a temporary injunction requires, and for the further reason that the court was in reality dealing with a final injunction, and failed to exercise the sound, judicial discretion demanded by equity and by Section 266 of the Judicial Code expressly, the decree should be reversed.

III.

THE COURT ABUSED ITS DISCRETION WHEN IT ISSUED THE INTERLOCUTORY DECREE WITHOUT RESERVING TO THE PUBLIC SERVICE COMMISSION ANY POWER TO MAKE THE RATE REDUCTION, HEREIN ENJOINED, BY WAY OF A PERMANENT ORDER AFTER COMPLETION OF ITS INVESTIGATION AND AFTER THE TEMPORARY ORDER, HEREIN ENJOINED, SHALL HAVE EXPIRED BY ITS OWN TERMS.

We quote verbatim point IV from our Brief in Opposition to Motion to Affirm (pp. 21-22).

"IV.

"THE COURT PARALYZED THE POWER OF THE PUBLIC SERVICE COMMISSION TO ISSUE A PERMANENT RATE ORDER AFTER THE TEMPORARY ORDER, ENJOINED, SHALL HAVE EXPIRED BY ITS OWN TERMS.

"The statutory court not only enjoined the Commission's order which expires July 31, 1933. The court also

enjoined the rates, i.e., the 12½% rate reduction, *as such.* (444)**

"The Wisconsin Commission's order, enjoined, is an interim order. Investigation of the Wisconsin Telephone Company by the Commission began in August, 1931. At the expiration of eleven months of study by the Commission's staff, a temporary rate reduction was ordered, effective for a year.

"The investigation is in constant progress. (R. 232)*** At the end of a further twelve or thirteen months —that is, when the temporary order has expired—the Commission may be possessed of a record which indisputably calls for a 12½% rate reduction by a permanent order.

"The Commission could not issue such order without being in contempt of court, assuming the interlocutory injunction still in effect, which we do assume, (III, *supra*).

"Reservation to the Commission of power to issue a permanent order under such circumstances, should have been made in the decree. There is no such reservation. (R. 443-446)****

"We hope that appellee is right in saying in its Statement in support of motion to affirm that 'at the end of the year designated in the Commission's order, *the force of the injunction is spent.*' (Separate Record, 20) We question, however, the soundness of appellee's construction. We do not want to risk our rights to interpretation.

"As to appellee's argument that we can always ask modification of the interlocutory injunction, if it appears proper for the Commission to issue a permanent order, we have this to say:

**This is page 630 in the printed record.
***This is page 431 in the printed record.
****This is pp. 629-632 in the printed record.

"The right of the Public Service Commission of Wisconsin to issue a permanent order after its temporary order has expired, should not be made dependent upon consent by the three members of the present statutory court to a modification of their own injunction.

"This right of the regulatory authorities of the State of Wisconsin to initiate a new order when the enjoined order has expired, should exist *as a right* and not at the discretion of the specially constituted District Court in the Western District of Wisconsin."

We submit that it was absolutely arbitrary and an improvident use of discretion to deny this Commission the power to issue a 12½% permanent rate reduction order after the enjoined interim order expires.

On this ground alone, the decree should be sent back.

IV.

THE COURT ABUSED ITS DISCRETION IN HOLDING THAT THE RATES PRESCRIBED BY THE COMMISSION'S ORDER WERE CONFISCATORY.

The Commission said, under the heading "FINDING ON RETURN": (R. 203)

> "The Public Service Commission of Wisconsin therefore finds the fact to be that the rates fixed by this order will produce a fair and reasonable return to the Wisconsin Telephone Company. This finding of fact represents an exercise of judgment in the light of the particular facts which are of record in this proceeding, and of which judicial notice can be taken. In reaching this finding of fact the Commission has given effect to present day conditions, to general conditions affecting all business, to the fact that the return allowed exceeds the returns of other business having comparable risks in the same part of the country at

this time, that the return will permit the utility to attract capial such as may reasonably be expected to be required and that the return is such that it will maintain the credit of the utility in the light of present conditions and opportunities for capital in other enterprises."

The Commission found a net return to the company of $3,812,227 from the "exchange" rates, before the rate reduction, and $2,445,777, after the reduction ordered, on an annual basis figured for 1931. (See Opinion and Order of the Commission, pp. 89, 96, 100. R. 139, 146, 150. Synopsis of Opinion and Order, p. ix. R. 50.)

We must accept this finding of the Commission. There is no finding of the lower court to the contrary.

The Commission further found that this sum of $2,445,777 would enable the Telephone Company—after paying all its operating expenses, including depreciation—to meet interest, preferred stock dividends, pay a common stock dividend of 6%, and leave $288,000 for surplus—as the return from "exchange" rates expressed in relation to local business. (See Opinion and Order of the Commission, pp. 100, 139. R. pp. 150, 189.)

According to the Commission's accountants, the return on common stock amounts to $13.35 per share (par $100) before the rate reduction and $7.41 thereafter and to 10.88% on common stock equity (par value of stock plus surplus) before the rate reduction and 6.04% thereafter. (R. 465, 466.)

The Commission considered this a reasonable earning during the period of its temporary or "emergency" order, pending completion of its investigation. (See Opinion and Order of Commission, pp. 139-153. R. 189-203.)

The Commission said, under the heading "FAIR RETURN": (R. 189)

> "The rates we have ordered into effect for exchange service will pay all reasonable operating expenses attributable to the local business, will cover an adequate provision for depreciation, taxes, all interest costs, dividends on preferred stock attributable to the local portion of exchange property, and then, over and above all these charges will provide a return on the investment in this property which when expressed in the language used in attracting capital to the Bell System, including the Wisconsin Telephone Company, is equal to 6% on the common stock; and in addition thereto provides a 'cushion' of some $288,000.
>
> "Such a return as is above described, in an economic crisis of the gravest proportions, we find to be reasonable and indeed liberal. . . . ."

The question before the District Court was: *Is this return permitted by the Commission,* CONFISCATORY!

The court, having made no findings whatever as to any of the factors which go into confiscation, is forced to the position that such a return as above outlined, is confiscatory *on its face.*

The court, in the exercise of legal discretion, could not reach such a conclusion.

The court can not determine confiscation, which means inadequate return on value, without at least a *prima facie* determination of:

1. What the actual return in dollars is,

2. What, as a matter of law, the rate of return should be, and,

3. What the value is.

The court determined none of these things and did not offer even a presumptive showing thereof. Making no determination of any of these elements upon which confiscation is necessarily predicated, it was wholly arbitrary and capricious to grant the injunction upon the purported ground of confiscation.

V.

THE COURT ABUSED ITS DISCRETION IN GRANTING THE INTERLOCUTORY INJUNCTION.

This, our last Assignment of Error, is a summation of our foregoing assignments argued as indicia of the Abuse of Discretion.

We desire to emphasize a further consideration: The lower court, under the *Prendergast* case, should have considered that it was dealing with a temporary order, where the investigation by the Commission was in steady progress, and where hearings were resumed promptly after the issuance of the temporary order. (R. 431)

> *Prendergast v. New York Telephone Company*, 262 U. S. 43, 50.

We are not saying that the challenge of confiscation can not be made against a temporary order. It can. That is the *Prendergast* case. We are saying that, in exercising its discretion, the court paid no attention to the fact that the "legislative" process was still going on *and was being expedited.*

Furthermore, as to the order issued, provision was included therein for modification of the order upon application by the company. (See Opinion and Order of the

Commission, pp. 154, 156. R. pp. 204, 206.) But the company did not apply. (R. 431)

We are not saying that this clause on modification in the order, is a bar to Federal jurisdiction. We do say that in exercising its discretion, the court should have paid attention to the fact that the complainant had not exhausted its remedy before the Commission.

These additional factors serve only to accentuate the abuse of discretion in issuing the interlocutory injunction.

CONCLUSION

We submit:

1. The decree should be reversed and this Court should hold that the injunction should not have been issued (II, III, IV, V, *supra*).

2. This Court should at least set aside the decree and remand for findings of fact and conclusions of law. (I, *supra.*)

Respectfully submitted,

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